TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted]255

J. E. HATHAWAY & COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 24, 1917.

(26,110)

(26,110)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 643.

J. E. HATHAWAY & COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 31, 1917.

1 I. *Petition and Exhibit "A."*

Filed April 4, 1913.

In the Court of Claims.

Law. No. 32443.

J. E. HATHAWAY & COMPANY

vs.

THE UNITED STATES.

Petition.

To the Honorable the Court of Claims:

The petition of J. E. Hathaway & Company respectfully represents:

That it is a corporation, having its principal place of business at Milwaukee, Wisconsin, and is engaged in the business of pile-driving and docking.

That under date of May 11, 1910, your petitioner entered into a contract with the Engineer Department of the United States for repairing the south revetment of Grand Haven, Mich. A copy of said contract and specifications is hereby made a part hereof, attached hereto, and marked Exhibit A.

That by reason of certain delays in the completion of said contract, the sum of $5,221.33 was deducted from the contract price as liquidated damages and as extra expense of inspection and superintendence.

2 That although said contract provided that work should be completed on or before December 1, 1910, and was subject to the approval of the Chief of Engineers, U. S. A., said contract was not approved until June 13, 1910, causing a delay of over 45 days to the claimant in the beginning of the work. That delay was further caused in various manners hereafter stated by reason of unforseeable causes of delay occurring through no fault of the contractor for which the contractor is excused in accordance with the proviso of Article 6 of said contract.

That said petitioner was delayed by reason of extra work not provided for in the contract of specifications in removing bulk-head at the east end of Section 3, and reconstructing the same at a point of about twenty-six feet east of its original position and constructing about twenty-six feet of additional revetment. In like manner petitioner was delayed by extra work of pulling down piles in the back row of the old revetment, and by removing a sunken scow which was an unexpected obstacle in the prosecution of the work.

That claimant was further delayed in the delivery of material by

reason of unusual rain-fall and freshets for which no damage should be charged in accordance with the provision of Article 6 of said contract.

That by reason of the foregoing delays for which the claimant is not responsible, the work was thrown into the winter months, at which time it was much more difficult to prosecute said work and by reason of said delays therefore the time limit was waived, and the claimant had a reasonable time within which to complete said work.

The said work was completed within a reasonable time.

3 That Article 6 of said contract provides for penalty, and not for liquidated damages, and in consequence no deductions can be made unless the Government suffered damages therefore. That the Government sustained no damages by reason of the delay.

That your petitioner filed a claim for $5,221.33, the original amount deducted before the accounting officers of the Treasury Department, who allowed the sum of $2,139.33 and disallowed the balance of said claim, namely, $3,082.00, the amount herein claimed.

That as this claim is found upon an express contract with the United States Government, the Court of Claims has jurisdiction to hear the same under the provisions of Section 1059, U. S. R. S.

That your petitioner is the sole owner of this claim and is the only party interested therein, and no assignment or transfer of this claim or any part thereof or interest therein has been made.

That your petitioner is justly entitled to the amount claimed, from the United States after allowing all just claims and set-offs.

Wherefore, claimant prays: That the Court may find that it is entitled to the refund of the amount deducted, $3,082.00, and that judgment be entered against the United States for the sum of $3,082.00; that the Court may grant such other relief as the nature of the case may require and that the Court may deem proper.

J. E. HATHAWAY & CO.,
By M. WALTON HENDRY,
Attorney in Fact.

4 DISTRICT OF COLUMBIA, *ss:*

M. Walton Hendry, being duly sworn, deposes and says:

I am the attorney in this case; I have read the above petition and the matters therein stated are true to the best of my knowledge and belief.

M. WALTON HENDRY.

Subscribed and sworn to before me this 4th day of April, 1913.

[SEAL.] J. C. KENNEDY CAMPBELL,
Notary Public, Wash., D. C.

EXHIBIT A.

1. These articles of agreement entered into this 11th day of May, nineteen hundred and ten, between Major C. S. Riché, Corps of Engineers, United States Army, hereinafter designated as the contract-

ing officer, representing the United States of America, of the first part, and J. E. Hathaway & Co. (J. E. Hathaway, sole owner), of Milwaukee, in the county of Milwaukee, State of Wisconsin, hereinafter designated as the contractor, of the second part, Witnesseth, that the said parties do hereby covenant and agree, to and with each other, as follows:

2. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish all materials, labor and appliances for Repair of South Revetment at Grand Haven, Mich., and shall receive in full compensation therefor at the rate of the following prices:

For cutting down and removing old work,—One Dollar and Fifty Cents ($1.50) per linear foot.

For Oak Piles,—Thirty-four (34) Cents per lin. foot.

For Oak Timber,—Seventy (70) Dollars per M. ft. B. M.

For Pine or Douglas Fir Timber,—Forty-two (42) Dollars per M. ft. B. M.

For Pine or Douglas Fir Planks for sheet piles,—Forty-five (45) Dollars per M. ft. B. M.

For Pine or Douglas Fir Plank for Walk,—Forty (40) Dollars per M. ft. B. M.

For Drift Bolts and Tie Rods,—Three (3) Cents per pound.

For Spikes,—Four (4) Cents per pound.

For Screw Bolts, Angle Irons, Carriage Bolts and Pile Shoes,—Five (5) Cents per pound.

3. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as does not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

4. The contractor shall commence, prosecute and complete the work herein contracted for as set forth in paragraph 15 of the attached specifications.

5. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the contracting officer, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the contracting officer shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the contractor, and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the contractor whatever sums may be expended by the United States in completing the said contract in excess of the price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses con-

nected therewith, incurred by the said United States, in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the contractor, and the contracting officer may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid; and upon the giving of the said notice the contracting officer shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise, in accordance with law.

6. Time shall be considered as an essential feature of this contract; and in case of the failure on the part of the contractor to complete this contract within the time specified and agreed upon the United States will be damaged thereby, and the amount of said damages, exclusive of expenses for inspection and superintendence, including necessary traveling expenses, being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such damages shall be estimated, agreed upon, liquidated, and fixed in advance; and they are hereby agreed upon, liquidated, and fixed at the amount of $100.00 for each and every day the con-
7 tractor shall delay in the completion of this contract; and the contractor hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the said sum of $100.00 for each and every day the contractor shall delay in the completion of this contract. Should this contract not be completed within the time specified and agreed upon the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence, including all necessary traveling expenses connected therewith, which shall be determined by the contracting officer and deducted from any payment due or to become due the contractor: Provided, however, That no liquidated damages and no charges for inspection and superintendence shall be made for such period, after the date of expiration of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from commencing or completing the work or delivering the material within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final; but any allowance of time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract.

7. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of
8 labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed

upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: Provided, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

8. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specially included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

9. The contractor shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

10. Until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

11. The contractor shall hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind for, or on account of, the use of any patented invention, article, or process included in the materials hereby agreed to be furnished and work to be done under this contract.

9 12. Payments shall be made to the contractor as prescribed in paragraph 17 of the specifications hereto attached and forming part of this agreement.

13. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by the said contractor are reserved to the United States.

14. No Member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

15. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

16. In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction, is prohibited.

17. No mechanic or laborer employed on the work herein specified will be permitted or required by the contractor to work more than eight hours in any one calendar day except in case of extraordinary emergency.

18. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written.

10 Witnesses:

C. SCHAUROTH, as to

C. S. RICHE,
Major, Corps of Engineers, U. S. Army.

JAMES P. BROWN, as to

J. E. HATHAWAY & CO.,
By J. E. HATHAWAY,
Sole Owner.

(Executed in triplicate.)

Approved: June 9, 1910.

W. L. MARSHALL,
Brig. Gen., Chief of Engineers, U. S. Army.

11 *Improving Harbor at Grand Haven, Michigan—Repair of South Revetment—War Department.*

[Advertisement.]

UNITED STATES ENGINEER OFFICE,
57 PARK STREET, GRAND RAPIDS, MICH., March 30, 1910.

Sealed proposals for repair of south revetment at Grand Haven, Mich., will be received at this office until 3 p. m., April 29, 1910, and then publicly opened. Information on application.

C. S. RICHÉ,
Major of Engineers.

General Specifications.

* * * * * * *

4. The bidder to whom the award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of ten thousand dollars within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which may be inspected at this office, and will be furnished, if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract, which will provide for liquidated damages in an amount of $100 per day for any period of delay beyond the time agreed upon for completion. The right is reserved to reject any or all bids, and to waive any informality in the bids received.

* * * * * * *

15. The contractor will be required to commence work under the contract within 15 days after receipt of notification of approval of contract, to prosecute the said work with faithfulness and energy, and to complete it on or before December 1, 1910.

16. The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, unless extraordinary and unforseeable conditions supervene.

* * * * * * *

Description of Work.

18. Extent and location.—The work to be done is the repair of the south revetment as follows: I. Station 7 + 09 to 11 + 68, 459 lin. feet. II. Station 18 + 35 to 30 + 03, 1,168 lin. feet. III. Station 30 + 03 to 43 + 61, 1,358 lin. feet.

12 II. *Repairs to South Revetment Station* 18 + 35 *to* 30 + 03.

26. Existing structure—The old superstructure is 14 feet wide and 4 feet high, except the rear wall station 18 + 35 to 22 + 77, which is 2 feet high, and has a plank walk. The front wall rests on a row of close, round piles with top at about + 1.4 feet, and the rear wall on a row of piles about 8 feet centers. There is a wale on the front piles. The filling consists of slabs, edgings, and stone; the average elevation of the top of the filling is about — 0.5 feet. The present depths along the channel face, referred to zero of gauge, vary from about 10 feet to 21 feet with an average of 14.2 feet. The revetment occupies the site of an old railroad pile pier, of which some of the piles still remain inside of the work.

27. Proposed repairs.—The work to be done is the removal of the old superstructure, the cutting down of the old front piles to the level of — 1.0 feet, the strengthening of the front wall by a new row of piles, the driving of a new row of rear piles, the connecting of the front and rear walls with wales and tie-rods, and the building of a new superstructure, all in accordance with these specifications and with the drawings marked "Repairs to south revetment stations 18 + 36 to 43 + 61, sheet I," which will form a part of the contract and which may be seen at this office.

28. Removal of old work.—The superstructure, front wale, etc., will be removed as follows: Front wall station 18 + 35.2 to about station 30 + 03; rear wall station 18 + 39 to about station 30 + 20, the portion from 30 + 03 to 30 + 20 to be removed in connection with the construction of Section III. The front piles will be sawed off at — 1.0 feet, and the rear and interior piles will be cut down and the filling will be removed as far as required for properly placing the new timbers, bolts, and tie-rods, and the stone, if any is removed, will be carefully preserved and subsequently replaced in the repaired work.

29. Repairs of substructure.—New piles will be driven to fill the vacancies in the front row of old piles which permit the escape of the

stone filling; these piles will be 24 feet long in the work with the tops at — 1.0 feet; twelve piles for this purpose have been provided in the bill of material, but the contractor will furnish the requisite number, which will be paid for at the contract price. A 12″ x 12″ cap, in lengths as shown in the drawing, will be secured to the piles in the old front row by a 24″ drift bolt in each pile, and so as to serve as a guide for the new front piles. A row of new front piles will be driven at intervals of 4 feet between centers, except at the east end as shown in drawings, and in contact with the cap on the old piles, and the tops sized to a thickness of 12″ to insure a firm bearing against cap and wale; these piles will be 34 feet long in the work, with top at zero. A 10″ x 12″ oak wale, with vertical scarf joints two feet long at
13 pile crossings, will be placed along the outside of the new piles, with top at zero, and secured by screw bolts 36″ long through every new pile to the cap on the old piles (except the bolt at the east end, which will be secured to the corner post), and with bolts as shown through a 12″ x 12″ x 7′ block and the adjacent superstructure at the west end. The wale will be in lengths of 22 feet, except at the end, as shown in drawings. A row of new rear piles will be driven at intervals of 4 feet between centers, except at the west end as shown, and at a distance of 15 feet between centers from the front row; these piles will be 26 feet long in the work, with top at zero, and the rear face will be sized to receive the wale. The line of the new rear piles will be 1.0 feet back of the line of the present rear piles. A 10″ x 12″ wale, with vertical scarf joints 2 feet long at pile crossings, will be placed along the rear face of these piles, with top at zero, and secured by screw bolts 26″ long through every pile; the wale will be in lengths of 18 feet, except at the ends as shown. At station 30 + 03 there will be a cross wall of 5 piles, each 34 feet long in the work, with top at — 1.0 feet and with a 12″ x 12″ x 17′ 6″ cap resting on and secured to each pile by a 24″ drift bolt. At intervals of 8 feet tie-rods 18′ 2″ long will pass through the work from front to rear wales, except the tie-rod at east end, which will be 13 feet long and pass from the front wale through the cap cross wall as shown.

30. New superstructure.—This will be built as shown in the drawings, of 12″ x 12″ timbers in the side walls and 2″ x 12″ in the cross walls, except the east end wall as noted below. The front wall will be directly over the new front piles and the rear wall directly over the rear piles, the timbers in the first course of each wall being bolted with 24″ drift bolts to each pile. The width of the superstructure will be 16 feet. The front wall will be three courses high; at the west end it will overlap the front wall of the adjacent work and be secured to it by screw bolts, as shown, and at the east end it will be connected with the cross wall by a vertical post and screw bolts, as shown. The rear wall will be two courses high, except for 8 feet at the east end, where it is three courses high. The ties in the cross walls will be secured to the side walls by angles and screw bolts; west of station 29 + 88 there will be two 14-feet ties and one 6-feet tie; east of the station 29 + 88 there will be one wall with three 14-feet ties and one wall with three 9′ 9″ ties, the rear ends of the ties being secured to the end cross wall by 32″ screw bolts, as shown. The end wall at sta.

30 + 03 will have three courses of 12″ x 12″ x 15′ 4″ ties on the cap described in paragraph 29. The arrangement and lengths of the timbers and the bolting in the side and cross walls are shown in the drawings.

31. Walk.—This will consist of 3″ x 12″ planks in lengths and arranged as shown in the drawings; at station 29 + 92 the ends of the planks will be supported by a cleat spiked to the cross wall as shown in the drawings.

III. *Repairs to South Revetment, Station* 30 + 03 to 43 + 61.

32. Existing structure.—The present pier is a structure, excepting station 32 + 50 — 36 + 50, which is cribwork; there is an opening in the pile work sta. 37 + 60 — 28 + 17, 57 feet wide into the interior basin, and the Government warehouse, 80′ x 20′, occupies a portion of the pier sta. 38 + 84 — 39 + 64; there is an angle in the pier at sta. 42 + 80. The pile structure consists of two rows of close piles with superstructure 4 feet high and 14 feet to 16 feet wide, filled with slabs, edgings, brush, and stone, the average elevation of the top of the stone being — 2.08 feet; under the warehouse there are two rows of piles, with 10 piles in each row, at distances of about 8.5 feet and 17 feet in the rear of the rear wall of the pier; the rear wall is strengthened with buttresses of piles at intervals of about 80 feet and there are fender and mooring piles near the rear wall in the vicinity of the basin opening and warehouse. The 400 feet of cribwork, 18 feet wide and 22 feet deep below zero, filled with stone, rests on a foundation of stone reinforced by a row of round piles under the front wall; it is tipped over toward the channel and is anchored by chains extending to the shore; the average elevation of the top of the stone filling is about — 0.5 feet. The depths of water in rear of the present work vary from 10 feet to 23 feet, with an average of about 16.5 feet.

33. Proposed repairs.—The work to be done is building a new pile structure in the rear of and at a clear distance of about 5 feet from the present work from station 30 + 27.5 to 43 + 61, interrupted between stations 37 + 60 and 38 + 25 by an opening forming an entrance to the Government basin in rear of the pier, and connecting the west end of same at station 30 + 27.5, by means of a similar structure with the east end of Section II, described above, at sta. 30 + 03, all in accordance with these specifications and with the drawings marked "Repairs to South Revetment stations 18 + 33 to 43 + 61, in two sheets," which will form a part of the contract and which may be seen at this office.

34. Removal of old work.—The present structure, station 30 + 27.5 — 43 + 61 will be left intact, except the following, which will be removed: Such portions of the buttress pile structures, the fender and mooring piles, and the foundation piles under the warehouse as will interfere with the new work, and such portions of the pier as will interfere with placing the two front pile clusters described in paragraph 39 and as may interfere with the placing of tie-rods, etc. From station 30 + 03 to 30 + 27.5 such portions will be removed as

found necessary to place the new work; the removal of the rear wall to about sta. 30 + 20 for this purpose is provided for in paragraph 28. No payment will be made for the removal of old work in Section III, as described above, but the cost of such removal will be considered as included in the prices to be paid for the other parts of the work. The Government warehouse mentioned in paragraph 32 will be removed by the United States without cost to the contractor and so as not to interfere with or delay the contractor's operations.

35. New substructure.—A row of front piles 40 feet long in the work, with top at zero, will be driven at intervals of 2 feet between centers, except at the angles as shown in drawings, and sized on the front face to receive the wale. A 10" x 12" oak wale with vertical scarf joints 2 feet long at pile crossings, except at angles as shown, will be placed along the outside of the piles, with top at zero, and secured by screw bolts 2'6" long through each pile, except at the west end, sta. 30 + 04.5, where a 36" screw bolt will pass through the corner post. The wale will be in lenghts of 18 feet except at angles and ends as shown. A row of rear piles with top at zero and sized on the rear face to receive the wale will be driven as follows: Sta. 30 + 03 — 30 + 27.5, in the connecting portion, 26 feet long in the work and 4 feet between centers, except at the ends, as shown; sta. 30 + 25.5 — 31 + 50.5, 32 feet long in the work and 4 feet between centers; sta. 31 + 50.5 to east end 2 feet between centers, except at the east end, as shown, and 32 feet long in the work except sta. 32 + 70.5 — 36 + 20.5 which will be 36 feet long in the work and the end piles on either side of the same entrance, which will be 40 feet long in the work. A 10" x 12" wale with vertical scarf joints two feet long at pile crossings, except at angles as shown, will be placed along the outside of the piles, with top at zero, and secured by screw bolts 26" long through each pile; the wale will be in lengths of 18 feet, except at angles and ends, as shown. The distance between centers of the front and rear rows of piles will be 15 feet in the connection portion, station 30 + 03 — 30 + 27.5 and 19 feet east of sta. 30 + 27.5. At the two angles, sta. 30 + 27.5 and 42 + 80 and at the east end, sta. 43 + 5 6.5, there will be cross walls of 5 piles, each pile 40 feet long in the work, with top at zero. The cross walls at stations 37 + 58.5 and 38 + 26.5 between which will be the opening to the rear basin, will consist of 9 piles, each pile 40 feet long in the work, with top at + 3.0 feet. At intervals of 8 feet, except at the angles and ends, as shown, tie-rods will pass through the work from front to rear wales; west of sta. 30 + 27.5 they will be 18' 2" long, except the west tie-rod, which will be 13 feet long and pass from the front wale through the cap in the cross wall, as shown; east of sta. 30 + 27.5 the tie rods will be 22' 2" long. The piles in the cross walls each side of the opening and in the end wall sta. 43 + 56.5 will be sized to a thickness of 12 inches to receive the timbers on each side, as shown.

36. Sheet piles.—At the east end, sta. 43 + 58, there will be a cross wall of sheet piles driven in close contact with a guide on the east face of the cross wall of round piles, and secured at the top by a binder and stringer. The guide and binder will each be 6" x 12" x 19' and

the stringer 10″ x 12″ x 17′. The guide and stringer, with tops at zero, will be secured to the top of two of the piles in the cross wall by 31″ screw bolts, as shown. A 12″ x 12″ x 25′ square pine or fir pile, with top at — 1.0 feet will be driven at sta. 43 + 58 with its front face flush with the front face of the rear wale and secured to the rear wale by a 24″ drift bolt, as shown in drawings; a 2½″ x 3″ x 23′ strip secured to the front face, before driving, with 7 spikes 7″ x ⅜″, will serve as a tongue to receive the first sheet pile. The sheet piles will be 25 feet long in the work, with top at zero, and will be formed of three planks assembled by 10 carriage bolts after the manner of the Wakefield sheet piling, and pointed for driving, as shown in the drawings; the plank next to the guide, the tongue, and the plank next to the binder will be four, three, and two inches thick, respectively, and all planks will be 12 inches wide; the planks forming the tongue will be dressed to a uniform thickness and the sheet piles will be driven in close contact with the guide and, as shown in drawing, the first pile in contact with the square pile previously mentioned. The binder, with top at zero, will be secured to the top of the sheet piles by three 46″ screw bolts passing through the guide, piles, and stringer, as shown in the drawings.

37. New superstructure. — This will be built, as shown in the drawings, of 12″ x 12″ timbers in the side walls and in the cross walls at sta. 30 + 27.5 and 42 + 80 and the end walls at the basin entrance and at sta. 43 + 56.5, and of 8″ x 12″ timbers in the other cross walls. The front and rear walls will each be three courses high and will rest directly on the front and rear piles, respectively, the timbers in the first course of each wall being molted with 24″ drift bolts to each pile. The length of timbers in each wall will be 16 feet, except at angles and ends as shown in the drawings. The width of the superstructure will be 16 feet west of sta. 30 + 27.5 and 20 feet east of that station. The cross walls will be secured to the side walls by angles and screw bolts; west of sta. 30 + 27.5 there will be three 14′ ties, except in the short wall A—B with three ties 9′ 3″ long secured at the rear end to the cross wall by 32″ screw bolts and the short wall G—H with three ties 9′ 8″ long secured at the front end to the cross wall by 24″ screw bolts, as shown in the drawings; east of sta. 30 + 27.5 the cross walls will consist of three 18′ ties. The end walls at the basin entrance and the east end wall sta. 43 + 56.5 will each have three 12″ x 12″ x 18′ ties secured to the side walls by angles and screw bolts; the wall at station 43 + 56.5 will rest on the five round piles and the first course will be secured to each pile by a 24″ drift bolt. The cross wall at sta. 30 + 27.5, J—K, will have three courses each 12″ x 12″ x 18′ 6″ and the cross wall at sta. 42 + 80, L—M, will have three courses each 12″ x 12″ 18′ 4″; each of these walls will rest on the five piles of the cross wall and the first course will be secured to each pile by a 24″ drift bolt. The exposed face of each end wall at the basin entrance will be protected by four horizontal guard timbers each 12″ x 12″ x 20′; the bottom timber will be bolted to the end piles with 26″ screw bolts and the three upper timbers will be bolted to the piles and end wall with 39″ screw bolts; the timbers and bolts will be placed as shown in the drawings. Corner posts or angle

blocks will be placed and secured as shown in drawings to connect the side and cross walls at sta. 30 + 03, 30 + 27.5 and 42 + 80. The arrangement of the timber and bolts in the side and cross walls is shown in the drawings.

38. Walk.—This will consist of 3" x 12" planks in lengths and arranged as shown in the drawings.

39. Fender piles.—Four clusters of seven piles each, with tops at + 6.0 feet, will be driven as shown in the drawings to protect the four corners of the pier at the basin entrance; the piles in the two front clusters will be 40 feet long in the work, and those in the two rear clusters 38 feet long in the work. The piles in each cluster will be driven with one pile in the center and six piles evenly spaced in a circle 6 feet diameter; after driving, the tops of the six piles will be drawn together in close contact with the center pile and with each other and securely lashed with four turns of wire cable, which will be securely fastened as shall be directed; the wire cable will be furnished by the Government free of cost to the contractor, and no charge will be made by the contractor for the work of securing it in place.

17 In the Court of Claims.

No. 32443.

J. E. HATHAWAY & COMPANY

v.

THE UNITED STATES.

Filed August 24, 1917.

Stipulation.

It is hereby stipulated and agreed that in the record on appeal to the Supreme Court of the United States it shall be sufficient to include only the following portions of the general specifications. Paragraphs 4, 15, 16, 18, and 25 to 39, inclusive.

KING & KING,
Attorneys for Claimant.
HUSTON THOMPSON,
Assistant Attorney-General.
S. S., JR.

18 II. *General Traverse.*

Court of Claims.

No. 32443.

J. E. HATHAWAY & COMPANY

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

19 III. *Argument and Submission of Case.*

On March 8, 1917 the case was argued by Mr. M. Walton Hendry, for the claimants, and Mr. Seth Shepard, Jr., for defendants, and thereupon submitted.

20 IV. *Findings of Fact, Conclusion of Law, and Opinion by Hay, J.*

Filed March 19, 1917.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is, and has been continuously for a period antedating the dates of the transactions involved in this cause, a corporation having its principal place of business at Milwaukee, Wis.

II.

The claimant executed with C. S. Riche, major, Corps of Engineers, United States Army, for and on behalf of the United States, subject to the approval of the Chief of Engineers, a contract dated the 11th day of May, 1910, for furnishing all materials and making various repairs to the south revetment at Grand Haven, Mich. The contract, marked "Exhibit A," and filed with the petition, is made a part of this finding. On May 11 this contract was sent to claimant for signature. On May 18 the United States engineer office at Grand

Rapids, Mich., received the contract from claimant duly signed, and on the same day the contract was forwarded to the War Department at Washington for approval. The Illinois Surety Company, of Chicago, furnished the bond required by the specifications, which bond was forwarded to the War Department at the same time the contract was forwarded. The bond signed for the Illinois Surety Company by its attorney in fact recited that the resolution of the board of directors of the said company authorizing the attorney in fact to sign for it was on file in the War Department. On May 24 the War Department notified the Illinois Surety Company that a copy of the resolution of its board of directors was not on file in the War Department and requested evidence of the authority of the attorney in fact to sign for the company be furnished as soon as possible. On June 1 the War Department again wrote the Illinois Surety Company
21 asking for the certified authorization of its attorney in fact. On June 6 the Illinois Surety Company replied by letter, dated Chicago, Ill., and furnished the requested authorization of its attorney in fact. On June 9 the contract was approved by the Chief of Engineers, and on June 10 was sent to the United States engineer office at Grand Rapids, Mich., and arrived in that office on June 13; the contractor was notified of the approval of the contract by telegraph on June 13. There was no unreasonable delay on the part of the Government in approving the contract.

III.

The work was required by the contract to be completed on or before December 1, 1910; the work was not completed until February 7, 1911, a delay of 68 days; the contracting officer found that the contractor consumed 19 days in performing extra work in removing bulkhead at section 3, in pulling piles in back row of old revetment, and in removing a portion of a sunken scow; a credit of 19 days did not cover all of the time lost, for the reason that the completion of the work was thereby thrown into the winter months, and by reason thereof the claimant was entitled to an additional allowance of 50 per cent or a total credit of 29 days, instead of 19 working days, so, crediting Sundays and holidays occurring subsequent to December 1, 1910, the contractor was entitled to an extension of time equivalent to 37 calendar days. This finding was approved by the Chief of Engineers and claimant was charged with 29 days' delay from January 10 to February 7, 1911, inclusive, liquidated damages in the sum of $2,900, and superintendent and inspection charges in the sum of $182, making a total of $3,082. The claimant duly protested against this deduction from their contract price.

IV.

Paragraph 6 of the contract between the parties is as follows:

"6. Time shall be considered as an essential feature of this contract; and in case of the failure on the part of the contractor to

complete this contract within the time specified and agreed upon the United States will be damaged thereby, and the amount of said damages, exclusive of expenses for inspection and superintendence, including necessary traveling expenses, being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such damages shall be estimated, agreed upon, liquidated, and fixed in advance; and they are hereby agreed upon, liquidated, and fixed at the amount of $100.00 for each and every day the contractor shall delay in the completion of this contract; and the contractor hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the said sum of $100.00 for each and every day the contractor shall delay in the completion of this contract. Should this contract not be completed within the time specified and agreed upon the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence, including all necessary traveling expenses connected therewith, which shall be determined by the contracting officer and deducted from any payment due or to become due
22 the contractor: Provided, however, That no liquidated damages and no charges for inspection and superintendence shall be made for such period, after the date of expiration of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from commencing or completing the work or delivering the material within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final; but any allowance of time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract."

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and its petition is therefore dismissed. Judgment is rendered in favor of the United States against the claimant for the cost of printing the record in this cause in the sum of one hundred and fifty-four dollars and thirty-eight cents ($154.38), to be collected by the clerk as provided by law.

Opinion.

HAY, *Judge*, delivered the opinion of the court.

J. E. Hathaway & Company entered into a contract with engineer officers of the United States, acting for and on behalf of the United States, whereby the former undertook to perform certain work within a certain specified time. This contract was dated May 11, 1910, and was approved by the Chief of Engineers on June 9 of that year. On July 2, 1910, the contractor began work on the contract. The contract provided that the work was to be completed on or before December 1, 1910, and that work was to begin within 15 days of the date of the approval of the contract.

The contract further provided that "time shall be considered as an essential feature of this contract; and in case of the failure on the part of the contractor to complete this contract within the time specified and agreed upon the United States will be damaged thereby, and the amount of said damages, exclusive of expenses for inspection and superintendence, including necessary traveling expenses, being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such damages shall be estimated, agreed upon, liquidated, and fixed in advance; and they are hereby agreed upon, liquidated, and fixed at the amount of $100 for each and every day the contractor shall delay in the completion of the contract; and the contractor agrees to pay that amount as liquidated dam-
23 ages and not by way of penalty." It was also agreed that the contractor should pay "all expenses for inspection and superintendence, including all necessary traveling expenses in connection therewith, during the period of delay." The contract further provides that the United States may deduct the above-mentioned sums from any payment due or to become due the contractor.

There is a proviso that "no liquidated damages and no charges for inspection shall be made for such period, after the date of expiration of the contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer." It is also provided that "the findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties thereto as final."

The contractor began work on his contract on the 2d day of July, 1910, and completed the work on February 7, 1911. His contract required him to complete the work on December 1, 1910. The work was delayed for 68 days. The contractor was given credit for a certain number of days ascertained to have been consumed in certain extra work which was required by the contracting officer, and was only charged with 29 days' delay, liquidated damages in the sum of $2,900, and inspection and superintendence charges in the sum of $182. The contracting officer recommended that the contractor be not required to pay any of the liquidated damages, but the Chief

of Engineers refused to approve that recommendation, and there was deducted from the amount due the contractor the sum of $3,082.

It does not appear that the delay in completing the work can be charged to any cause for which the United States is responsible, and therefore the plaintiff must live up to his contract. "He must make his contract good unless his performance is rendered impossible by the act of God, the law, or the other party." United States v. Gleason, 175 U. S., 588-602. His contract was to complete the work by December 1, 1910, and to pay $100 for each and every day he should delay in the completion of his contract. He did not complete it until February 7, 1911. He was given credit for every day which it was possible to give him under the terms of the contract, and while it may seem hard that he should lose this amount of money, yet there is no legal ground upon which the plaintiff can escape from the terms of the contract to which he has agreed. Maryland Dredging and Contracting Co. v. United States, 241 U. S., 184, 190.

It is ordered by the court that the petition in this cause be and the same is dismissed, and judgment is rendered in favor of the United States against the claimant for the cost of printing the record in this cause in the sum of $154.38, to be collected by the clerk as provided by law.

Downey, Judge; Barney, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

24 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the nineteenth day of March 1917, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that J. E. Hathaway & Company, are not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that the petition in this cause be and the same hereby is dismissed: And, it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the claimants, J. E. Hathaway & Company, the sum of One hundred and fifty-four dollars and thirty-eight cents ($154.38), the cost of printing the record in this cause in this court, to be collected by the Clerk as provided by law.

By THE COURT.

25 VI. *Proceedings After Entry of Judgment.*

On May 17, 1917 the claimants filed a motion for a new trial. Said motion was overruled by the Court on May 28, 1917.

26 VII. *Claimants' Application for and Allowance of Appeal to the Supreme Court.*

From the judgment rendered in this cause on the 19th day of March, 1917, the claimant, J. E. Hathaway & Co., by its attorney, hereby makes application for and gives notice of an appeal to the Supreme Court of the United States.

M. WALTON HENDRY,
Attorney for Claimant.

NOTE.—A motion for new trial was filed in the above entitled cause on May 17, 1917, and overruled by the Court May 28, 1917.

Filed July 25, 1917.

Ordered That the above appeal be allowed, in vacation, as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

Aug. 7, 1917.

27 In the Court of Claims.

No. 32443.

J. E. HATHAWAY & COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the final judgment of the Court; of the application of the claimants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City this 24th day of August, A. D. 1917.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 26,110. Court of Claims. Term No. 643. J. E. Hathaway & Company, appellant, vs. The United States. Filed August 24th, 1917. File No. 26,110.

Supreme Court of the United States.

October Term, 1876.

No. 255.

J. E. HATHAWAY & COMPANY, Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

GEORGE A. KING,
WILLIAM A. KING,
WILLIAM E. HARVEY,
Attorneys for Appellant.

Supreme Court of the United States.

October Term, 1918.

J. E. HATHAWAY & COMPANY,
Appellant,
v.
THE UNITED STATES.
No. 255.

APPEAL FROM THE COURT OF CLAIMS.

TABLE OF CONTENTS.

LIST OF CASES CITED.

BRIEF FOR APPELLANT.

I. Statement of the Case.

The appellant, a corporation, sued the United States in the Court of Claims, claiming the sum of $3,082, balance of the contract price of certain work. This sum was withheld by the United States as damages for delay in completion.

March 30, 1910, the United States Engineer Officer at Grand Rapids, Michigan, advertised for sealed proposals for repair of south revetment at Grand Haven, Michigan, to be opened April 29, 1910 (Rec. middle p. 6).

The annexed specifications provided (Rec. top p. 7):

"15. The contractor will be required to commence work under the contract within 15 days after receipt of notification of approval of contract, to prosecute the said work with faithfulness and energy, and to complete it on or before December 1, 1910."

Also (foot p. 6 of record):

"4. The bidder to whom the award is made will be required to enter into written contract with the United States, with good and approved security, in an amount of ten thousand dollars within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which may be inspected at this office, and will be furnished, if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of con-

tract, which will provide for liquidated damages in an amount of $100 per day for any period of delay beyond the time agreed upon for completion."

April 29, 1910, bids were opened.

May 11, 1910, claimant, being the accepted bidder, a contract was sent him bearing date of May 11, 1910, for signature (Finding II, Rec. foot p. 15, and date in contract, foot p. 2).

May 18, 1910, the U. S. Engineer Officer at Grand Rapids, Michigan, received the contract from claimant duly signed, with the required bond by the Illinois Surety Company of Chicago, and on the same day forwarded the contract to the War Department at Washington, D. C., for approval (Finding II, foot p. 13, top p. 14). This bond recited that a resolution of the board of directors of the company authorizing the attorney in fact to sign for it was on file in the War Department (Rec. near top p. 14).

May 24, 1910, the War Department wrote the Illinois Surety Company that no copy of such resolution was on file in the War Department and requested evidence of the authority of the attorney in fact (Finding II, rec. p. 14).

June 1, 1910, the War Department again wrote the Illinois Surety Company asking for certified authority of its attorney in fact (Finding II, rec. p. 14).

June 6, 1910, the Illinois Surety Company replied by letter furnishing authority (Finding II, rec. one-third down p. 14).

June 9, 1910, the contract was approved by the Chief of Engineers (Finding II, rec. one-third down p. 14).

June 10, 1910, the contract was sent by the Chief

of Engineers to the U. S. Engineer Office at Grand Rapids, Michigan (Finding II, near end, one-third down p. 14).

June 13, 1910, the Engineer Office at Grand Rapids, Michigan, received the contract so approved and notified the contractor of said approval by telegraph (near end Finding II, one-third down p. 14).

The court finds "There was no unreasonable delay on the part of the government in approving the contract" (end Finding II, p. 14).

The contract as thus executed and signed provided (par. 6, rec. p. 4), as the advertised specifications stated it would (near foot p. 6), for liquidated damages in an amount of $100 per day for any period of delay beyond the time agreed upon for completion.

The contract also provided (par. 6, rec. p. 4):

"Should this contract not be completed within the time specified and agreed upon the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence, including all necessary traveling expenses connected therewith, which shall be determined by the contracting officer and deducted from any payment due or to become due the contractor: Provided, however, That no liquidated damages and no charges for inspection shall be made for such period, after the date of expiration of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the

contractor, and which actually prevented such contractor from commencing or completing the work of delivering the material within the period required by the contract."

Finding III finds as follows (rec. p. 14):

"The work was required by the contract to be completed on or before December 1, 1910; the work was not completed until February 7, 1911, a delay of 68 days; the contracting officer found that the contractor consumed 19 days in performing extra work in removing bulkhead at section 3, in pulling piles in back row of old revetment, and in removing a portion of a sunken scow; a credit of 19 days did not cover all of the time lost, for the reason that the completion of the work was thereby thrown into the winter months, and by reason thereof the claimant was entitled to an additional allowance of 50 per cent of a total credit of 29 days, instead of 19 working days, so, crediting Sundays and holidays occurring subsequent to December 1, 1910, the contractor was entitled to an extension of time equivalent to 37 calendar days.

"This finding was approved by the Chief of Engineers and claimant was charged with 29 days' delay from January 10 to February 7, 1911, inclusive, liquidated damages in the sum of $2,900, and superintendent and inspection charges in the sum of $182, making a total of $3,082.

"The claimant duly protested against this deduction from their current price."

It is also stated in the opinion (rec. foot p. 16, top p. 17):

"The contracting officer recommended that the contractor be not required to pay any of the liquidated damages, but the Chief of Engineers refused

to approve that recommendation, and there was deducted from the amount due the contractor the sum of $3,082."

The Court of Claims decided against the claim and gave judgment accordingly. The opinion of the court was delivered by Judge Hay (rec. pp. 16, 17). It is reported 52 C. Cls. 267.

The claimant appealed to this court (rec. p. 18).

II. Assignment of Errors.

The appellant, J. E. Hathaway & Company, hereby assigns the following errors in the proceedings and judgment of the Court of Claims.

1. Said court erred in holding that the delay from May 11 to June 13, 1910, in approving the contract and notifying the contractor of the approval thereof, and in failing promptly to notify said contractor of the alleged informality in the bond was not a delay for which the United States was responsible, and such as to require an extension of time for performance.

2. Said court erred in sanctioning the deduction from the contract price of both liquidated and unliquidated damages, consisting of $100 a day, plus expense of inspection and superintendence and including any necessary traveling expenses incurred in connection therewith.

3. Said court erred in holding that 19 days' delay for extra work in the summer was compensated by a credit of an additional fifty per cent or a total credit of 29 days in the winter season, and should have held that a further credit was allowable.

4. Said court erred in not rendering judgment in favor of the claimant for the full sum withheld from the contract price, $3,082.

III. Brief of Argument.

Delay by the United States in Approving the Contract.

The court below found (Finding II, rec. pp. 16, 17) that the contract was signed and bond furnished by the contractor between May 11th and 18th, 1910, and was sent on the latter date by the United States Engineer Officer at Grand Rapids, Michigan, to the Chief of Engineers for approval. That office was not satisfied with the record authority of the bonding company's agent to sign the bond.

The fact that the season was the most favorable of the year for working and that the claimant was ready and willing to proceed should have suggested to the office of the Chief of Engineers the use of the telegraph. If a telegram had been sent to the contractor asking for evidence of the authority of the bonding company's agent, the required evidence of authority would probably have been immediately furnished. Instead of writing the contractor, the Chief of Engineers wrote the Illinois Surety Company at Chicago May 24th. No answer being received, the call was repeated June 1, 1910. Not until June 9, 1910, was the contract approved and the contractor notified of such approval June 13, 1910.

On these facts the court found, last sentence of Finding II, rec. p. 14, that there was no unreasonable delay on the part of the government in approving the contract.

Here was a month taken, at the best season of the year for working, simply to obtain record evidence of the authority of the attorney in fact of the surety

company to sign the contract. The delay was wholly on the part of the government. Whether styled "reasonable" or "unreasonable," it was a delay for which the contractor was in no degree responsible. That the delay in signing the contract on the part of the government was reasonable is, it is submitted, not a finding of fact but a conclusion of law. *United States* v. *Pugh*, 99 U. S. 265; *Sun Insurance Co.* v. *Ocean Insurance Co.* 107 U. S. 485, 502, 503. Such a conclusion embodied in the findings of fact is not binding in this court.

The provision of the contract, par. 6, rec. p. 4 (quoted, *ante*, pp. 4, 5), looks primarily to causes of delay occurring subsequently to the contract becoming a legally binding obligation between the United States and the contractor.

When the contract was signed by the contractor and the bond executed by a surety company, the contractor had done everything which he could do to enter into a legally binding contract with the government.

By paragraphs 572 to 575 of the Army Regulations, 1908, in force at the time of the signature of this contract, provisions are made as to the execution of bonds for the performance of contracts. It is provided by paragraph 575:

> "Lists of such surety companies as have conformed to the requirements of law and these regulations will be published from time to time by the War Department."

The Illinois Surety Company must have been one of the companies contained on that list, for no objection was made to the company but only to the absence of evidence of the authority of the attorney in fact to execute the bond. To supply this slight defect a

telegram should have been sent to the contractor. The slowest method, however, was resorted to. The Chief of Engineers communicated with the surety company at its main office by mail. After quite dilatory proceedings, both by the officers of the government and those of the surety company, the necessary authority was finally furnished, the contract approved by the Chief of Engineers, and authority given to proceed with the work June 13, 1910.

By the bid of April 29, the company agreed to complete the work by the following December 1st. The bid was subject to the implied condition that there should be a prompt compliance with the necessary steps of entering into the contract.

The injustice of holding this contractor to a date of completion offered by him on April 29, when he was not notified of the completion of the contract as a binding obligation of the government until June 13, is apparent. As soon as the contractor made his bid April 29, 1910, he was bound (*United States* v. *Porto Rico Steamship Company*, 239 U. S. 88). He was not notified that the contract was awarded to him until May 11, twelve days thereafter. There is no explanation of this delay and no apparent reason for it. There was nothing to do on April 29 but open the bids, compare them and award the contract to the lowest bidder.

The agreement which the contractor obligated himself to enter into on April 29, 1910, and which he actually did execute between May 11 and 18, he had no reason to suppose would be withheld by the government until June 13. True, the contract was not to perform the work within a specified number of days

from its date, but by a particular date, December 1, 1910. The principle, however, is the same.

District of Columbia v. *Camden Iron Works*, 181 U. S. 453, is here directly in point. The contract in that case bore date of June 29, 1887, but it was actually executed and delivered August 4, 1887, as shown by the report in the court below (15 App. D. C. 198, 210, 211). It provided for delivery of the goods as follows: "within 136 days *after the date of the execution* of the contract; one-half of each size to be delivered on or before September 25, 1887, and the remaining on or before November 10, 1887."

The contract provisions were thus summarized, 181 U. S. 455:

"The contract provided for the manufacture of certain designated sizes of iron pipe by the plaintiff, and its complete delivery to the defendant, 'within 136 days *after the date of the execution* of the contract; one-half of each size to be delivered on or before September 25, 1887, and the remainder on or before November 10, 1887.' For failure to deliver the pipes within the time thus fixed, the contract provided that there should 'be deducted from the contract price, as in said contract specified, one per cent of the contract price for all delinquent articles for each and every week day that they remained delinquent.' There was a further provision that for failure to complete the work at the time specified, there should be deducted from the money to become due under the contract 'the sum of ten dollars *per diem* for the same period estimated as liquidated and fixed damages to the District.'"

There was not only provision for delivery within a certain number of days, but specifications of exact dates. It was held admissible to show by parol evi-

dence that it was not in fact executed and delivered by the Commissioners of the District of Columbia until a later date. The contractor was held entitled to a corresponding extension of time to deliver.

This case is exactly parallel. The nominal date of the contract is May 11, 1910. The date of its delivery as a completed formal obligation was June 13, 1910. The contractor was entitled to a corresponding extension of time for performance.

American Dredging Co. v. *United States*, 49 C. Cls. 350, is identical in principle with this case. There the bids were opened November 15, 1907, but the contract duly approved did not reach the claimant until January 27, 1908, 73 days later. The court held that the claimant was entitled to an extension coextensive with the period of delay in signing the contract. In answer to other contentions that may be urged, it was stated (p. 360):

"It might, perhaps, be urged that by signing the contracts January 6, 1908, the claimant thereby waived any right to take advantage of the delay of the Government; also that by undertaking the completion of the work after the contracts had been approved January 23, 1908, it waived such right. In answer to this it may be said that the claimant had the right to assume that if the Government was reasonably diligent after the contracts were sent to it January 6, 1908, in notifying it of their approval it would still have had nearly the whole month of January within which to begin the work. Further than that, the claimant was under bonds to sign the contracts and was also under bonds after the contracts were signed to perform them. It would have been a hazard which we do not think the claimant was bound to incur, if it had either refused to sign the contracts when they

were received or to perform them after receiving notice of their approval. We believe rather it had the right to assume that the time limit for their execution would be reasonably extended."

And again (p. 361):

"If the contract in this case was to have been performed within a stated time designated as a certain number of days, months, or years after the execution of the contract, it would present a different question, but it was to be performed before a certain day named. In cases arising under the first class of contracts mentioned, it might well be said that by undertaking to perform the contract the contractor had waived any delay in its execution. Where, however, as in this case, the contract is to be performed before a certain day stated, it would seem reasonable that where there is unreasonable time taken by the Government in its execution and approval after the acceptance of the bid, the day before which performance was required should be set forward for a time corresponding with this delay. In other words, when a contractor has made a bid to perform work before a certain day, he has a right to presume that the contract will be executed and approved within a reasonable time, and if this is not done, that the time limit will be correspondingly extended."

The government accepted the decision in the *American Dredging Co.* case by taking no appeal therefrom, and the doctrine of that case should be controlling here.

In *Ittner* v. *United States*, 43 C. Cls. 336, the contractor agreed to begin work on or before a particular day, April 6, 1903, and complete it on or before January 1, 1904. It was not approved by the Quartermaster-General of the Army until April 28, 1903, 22 days subsequent to the time of beginning work under the contract. The court held that this was a waiver

of the time limit and relieved the contractor from any liability for damages for not completing on time.

The same rule was laid down in *Little Falls Knitting Mill Co.* v. *United States*, 44 C. Cls. 1.

In *Callahan Construction Co.* v. *United States*, 47 C. Cls. 229, 235, 236, the court said:

"In this case the plaintiff was delayed somewhat less than two months on account of the delay of the Government in approving the contract, and it was relieved for that length of time from paying cost of inspection. In the absence of proof to the contrary, an extension of time coextensive with the period of delay appears to be reasonable, and the court has so found."

Laidlaw-Dunn-Gordon Company v. *United States*, 47 C. Cls. 271, is also similar to this case as appears by Par. 1 of the syllabus:

"Where time is of the essence of the contract it is the duty of the responsible officer of the government to sign the same within a reasonable time after the contractor has done so. Where he delays for 30 days it will operate by implication to extend the time for the completion a corresponding period."

The decision of the Comptroller of the Treasury in the case of *Missouri Valley Bridge & Iron Company*, 19 Comp. Dec. 712, is also in point. There proposals for constructing 8 steel barges were opened at Kansas City, Missouri, May 1, 1911. The formal contract was dated June 1, 1911, the contractor notified of the approval of the contract by the Chief of Engineers June 27, 1911, and began work on the same day. The requirement was to commence work within ten days

after the date of receipt of notification of approval of the contract by the Chief of Engineers, U. S. Army, and to complete and deliver the barges within seven months after date of notification.

It was held that at the time of submitting the bid the contractor had reason to believe that it would be allowed to begin said work in time to complete it by December 1, 1911, and that the date of approval running the work into freezing weather was unreasonable and the contractor relieved of the obligation to deliver within the seven months limited.

Recommendation of Contracting Officer.

It appears by the opinion, though it is not stated in the findings of fact (rec. pp. 16, 17):

"The contracting officer recommended that the contractor be not required to pay any of the liquidated damages, but the Chief of Engineers refused to approve that recommendation, and there was deducted from the amount due the contractor the sum of $3,082."

The judgment of the contracting officer on the ground should have been followed, and the completion of the work not required by a date which the contracting officer had found to be unreasonable.

Liquidated and Unliquidated Damages Both Charged.

There are many discussions in the adjudged cases as to whether a certain sum named in a contract as damages for delay constitutes a penalty or liquidated damages. We have found no case, however, which permits a deduction of both liquidated and unliquidated damages; in other words, which permits a re-

covery of actual damages for delay and an additional arbitrarily fixed sum as liquidated damages.

The specifications advertised by the government, and upon which the contractor based his bid distinctly state that the contract "will provide for liquidated damages in an amount of $100 per day for any period of delay beyond the time agreed upon for completion" (specifications, par. 4, rec. foot p. 6).

After the contractor had made his bid and was thus bound, the contract placed before him, and which he had to sign, provided that in addition to these liquidated damages he should also pay all expenses for inspection and superintendence, as well as all necessary traveling expenses connected therewith (rec. middle p. 4).

The damages to arise from delay being liquidated and fixed by the specifications as well as by the contract at $100 a day, and the delay being twenty-nine days, there was no warrant for charging in addition to the $2,900, inspection and superintendence charges to the amount of $182.

If, notwithstanding the statement in the specifications, on which the bid was based, it be held that the contract provision should control, then the $100 a day should be treated as a penalty and not liquidated damages. The actual damages are shown by the record as $182. This is the limit of what the government is entitled to retain.

In *Clydebank Engineering Co.* v. *Don Jose Ramos* (1905), L. R. App. Cas. 6, the court speaks of liquidated damages as properly forming "a genuine pre-estimate of the creditor's possible or probable interest in the performance of the principal obligation." There was no attempt here to make a pre-estimate of the

damage to be suffered by reason of the delay. Payment of the actual damage was stipulated for and super-added to that was a provision for the payment of a per diem. There can not thus be a mixture of penalty and liquidated damages in the same contract.

In *Meyer* v. *Estes*, 164 Mass. 457; 32 L. R. A. 283, the agreement was in case of breach of the contract "to be responsible" "to the amount of any damages which may have been caused thereby" "and to pay furthermore a fine" "equal to the tenfold price of the wrongly used electrotypes."

The court said (32 L. R. A. 289): "The agreement does not provide that the damages suffered shall be considered to be tenfold the price of the wrongly used electrotype plates, but it leaves the damages to be assessed in the usual way and provides that the fine shall be paid in addition to the damages, whatever they may be. As under our law the fine must be considered as in the nature of a penalty, it can not be recovered, and the plaintiff is entitled to recover only the amount of the damages which have been caused by the breach of the contract."

In *Otis* v. *Cottage Grove Manufacturing Co.* 121 Ill. App. 233, the contract contained one clause allowing the owner to withhold $10 a day for delay and another that the contractor agreed to make good to the owner any damage caused by his delay. The court said (p. 235): "Construing that clause with the subsequent clause of the contract relating to the same subject-matter, the contract must be held to provide that the owner may withhold in case of such delay by the contractor, from the eighty-five per cent the contractor was entitled to receive as the work progressed, ten dollars per day for each day of such delay, until the

completion of the contract, and then, take from the amount so withheld the amount of the damages he sustained by reason of such delay."

In *Sorensen* v. *United States*, 51 C. Cls. 69, the specifications as advertised provided for a liquidated per diem damage. The contract also provided for the same liquidated per diem damage but also provided for the expenses of inspection.

The court said (p. 74):

"The specifications which were furnished to the plaintiff afforded the basis upon which he could and did bid for the work. We have shown by reference to them the provisions bearing on the subject of liquidating the damages, and it would be difficult to deduce from these provisions any other idea than that they contemplated a liquidation in advance of the amount of the recoverable damages."

The court considered many authorities and concluded that effect could not be given to both the liquidated damage clause and the clause providing for expenses of inspection. The conclusion is expressed as follows (pp. 83, 84):

"When they liquidated in advance the amount of the damages they fixed the amount which one could be required to pay or the other be entitled to recover in case of breach, and the clause as much limits the defendants' right to recover as it affects the plaintiff's obligation to pay. Both are bound by the liquidated damage clause."

"And we therefore have two clauses, in the first of which the full amount of the damages appears to be liquidated and fixed—which includes all elements of damages—while in the second clause another element is mentioned as an additional sum for recovery when that sum is included in the whole mentioned in the

first clause. There should not be a double recovery for the cost of inspection, and that cost as an element of damage is comprehended in the amount at which the damages are liquidated and fixed. It follows that the second clause is repugnant to the first and can not consistently with the language used and the rules of law be reconciled with the first clause. One or the other must give way, and it is an old rule that where two clauses in a contract are antagonistic to each other and can not be reconciled the first is allowed to stand."

The court in that case allowed the government to retain the liquidated damages and allowed the claimant to recover back the costs of inspection. The government acquiesced in that decision and took no appeal therefrom. It is conclusive against the right of the government to retain in this case both the amount of liquidated damages and charges for inspection.

In this case no damage appears by the findings to have been suffered by the government by delay in completion beyond the expense for inspection and superintendence, including all necessary traveling expenses connected therewith. The date fixed for completion was at the beginning of the winter season. It was in fact completed before the winter season was over. The expense of inspection and superintendence was all the damage there was. Retention of the $182 constituting this expense made the government whole for any delay suffered by non-completion. By the judgment rendered by the Court of Claims the government is allowed to withhold not only $182, damage actually suffered by the delay, but $2,900 in addition to the actual damage.

Credit for Extra Work.

Finding III (rec. p. 14) shows that 19 days were consumed in the performance of extra work and the completion of the work thereby thrown into the winter months, and the claimant thereby got an additional allowance of 50 per cent of time. In view of the weather conditions prevailing on Lake Michigan, this was not a reasonable allowance. The court will take notice of the fact that the winter on Lake Michigan is very severe and winter work frequently interrupted for long periods of time.

CONCLUSION.

The contract, although dated May 11, 1910, was not delivered until June 13, 1910. This made it a legal obligation from the latter date only. Both a per diem liquidated damage and expenses of inspection and superintendence could not properly be deducted, and the government is limited to one of these two sums.

In all the record and throughout the findings there is no suggestion that the claimant was guilty of any want of due diligence in the performance of the contract There was a simple excess of time in the performance,—an excess amply accounted for by delays and demands for extra work on the part of the government. Not only does the record show no responsibility for these delays on the part of the contractor, but it shows that the whole responsibility for the delay was on the government.

The judgment of the Court of Claims should be reversed and the cause remanded to that court for further proceedings.

GEORGE A. KING,
WILLIAM B. KING,
WILLIAM E. HARVEY,
Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

J. E. HATHAWAY & COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 255.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is an appeal from a judgment of the Court of Claims dismissing the petition of the appellant which sought to recover $3,082 as the balance of the contract price for repairing the south revetment at Grand Haven, Michigan.

STATEMENT OF THE CASE.

The amount claimed by the appellant was the sum withheld by the United States as damages for delay in completing the work by December 1, 1910, as required by the contract.

The contract was the result of a bid submitted by the appellant under the following advertisement:

> UNITED STATES ENGINEER OFFICE,
> *57 Park Street, Grand Rapids, Mich.,*
> *March 30, 1910.*
>
> Sealed proposals for repair of south revetment at Grand Haven, Mich., will be received at this office until 3 p. m., April 29, 1910, and then publicly opened. Information on application.
>
> C. S. RICHÉ,
> *Major of Engineers.*

109280—19——1

The information furnished on application consisted of the specifications for the work. These specifications, among other things, provided that the successful bidder would be required to enter into a written contract, with approved security, within 10 days after being notified of the acceptance of his proposal, and that this contract should be—

> in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which may be inspected at this office, and will be furnished, if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract, which will provide for liquidated damages in an amount of $100 per day for any period of delay beyond the time agreed upon for completion.

It was also provided that the contractor should commence work within fifteen days after receipt of notification of approval of contract, and prosecute the work with faithfulness and energy and complete it on or before December 1, 1910. (Rec. pp. 6, 7.)

The form of contract referred to contained this provision as to damages:

> Time shall be considered as an essential feature of this contract; and in case of the failure on the part of the contractor to complete this contract within the time specified and agreed upon the United States will be damaged thereby, and the amount of said

damages, exclusive of expenses for inspection and superintendence, including necessary traveling expenses, being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such damages shall be estimated, agreed upon, liquidated, and fixed in advance; and they are hereby agreed upon, liquidated, and fixed at the amount of $100 for each and every day the contractor shall delay in the completion of this contract; and the contractor hereby agrees to pay to the United States as liquidated damages, and not by way of penalty, the said sum of $100 for each and every day the contractor shall delay in the completion of this contract. Should this contract not be completed within the time specified and agreed upon the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence, including all necessary traveling expenses connected therewith, which shall be determined by the contracting officer and deducted from any payment due or to become due the contractor: *Provided, however*, That no liquidated damages and no charges for inspection and superintendence shall be made for such period, after the date of expiration of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer,

> or account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from commencing or completing the work or delivering the material within the period required by the contract. The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final; but any allowance of time and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract. (Rec. p. 4.)

On May 11, 1910, a contract in this form bearing date of that day was sent to appellant for signature. On May 18 the United States Engineer office at Grand Rapids, Mich., received from appellant the signed contract accompanied by a bond purporting to be signed by the Illinois Surety Company of Chicago, through an attorney in fact, and reciting that the resolution of the board of directors of that company authorizing the attorney in fact to sign for it was on file in the War Department. On the same day that this contract and bond were received at Grand Rapids, Mich., they were forwarded to the War Department at Washington for approval. It turned out, however, that the resolution of the board of directors of the surety company authorizing the attorney in fact to sign was not on file at the War Department. Accordingly on May 24

the War Department notified the surety company and requested that evidence of the authority of the attorney in fact to sign for the company be furnished as soon as possible. The surety company neglected to answer this request promptly, and on June 1 the War Department repeated it. On June 6 the surety company replied by letter dated at Chicago and furnished the requested evidence. On June 9 the contract was approved by the Chief of Engineers, and on the next day was sent to Grand Rapids, Mich., where it arrived on June 13, and on the same day the contractor was notified by wire of the approval of the contract. On these facts the Court of Claims found that there was no unreasonable delay on the part of the Government in approving the contract. (Rec. pp. 13, 14.)

The work was not completed until February 7, 1911, a delay of 68 days beyond the time fixed by the contract for its completion. The contracting officer, however, found that the contractor consumed 19 days in performing extra work, and that because this resulted in throwing the completion of the work into the winter months appellant was entitled to a credit of 29 days instead of 19 days. Hence, after crediting Sundays and holidays occurring subsequent to December 1, 1910, it was found that the contractor was entitled to a sufficient extension of time to reduce the 68 days delay to 29 days. It was therefore found that the Government was entitled to liquidated damages in the sum of $2,900, and superintendence and inspection charges in the sum of $182, making a total of

$3,082. This finding was approved by the Chief of Engineers and the sum of $3,082 deducted from the contract price, and this suit was brought to recover that amount. (Rec. p. 14.)

BRIEF.

CONTENTIONS OF THE APPELLANT.

The assignments of error complain of the judgment in three respects —

1. That appellant was not allowed an extension of time because of the delay from May 11 to June 13 in approving the contract.

2. That the judgment is erroneous because it allows liquidated damages of $100 a day, plus expenses of inspection and superintendence.

3. That the allowance of 29 days in the winter season was not a fair compensation for the 19 days lost in the summer.

QUESTION OF REASONABLENESS OF DELAY IN APPROVING CONTRACT FORECLOSED BY FINDINGS OF FACT.

In so far as appellant seeks relief on account of the alleged delay in approving the contract, he is precluded by the findings of fact. When he submitted his bid it was, of course, in the contemplation of the parties that some time must necessarily be consumed in the preliminaries necessary to have the formal contract executed and approved. Bids were opened at Grand Rapids, Mich. The contract was sent to the successful bidder at Milwaukee, Wis. A bond had to be executed by a surety company and, with the contract, returned to Grand Rapids.

Contract and bond had then to be sent to Washington for approval. The appellant could have no complaint if in carrying out these necessary preliminaries the officers of the Government acted with reasonable promptness. The question, then, is whether, as a matter of fact, these officers unreasonably delayed their action. In fact, this seems to be the extent of appellant's claim, for he quotes, among other things, from *American Dredging Co.* v. *United States* (49 C. Cls., 350) this statement:

> In other words, when a contractor has made a bid to perform work before a certain day, he has a right to presume that the contract will be executed and approved within a reasonable time, and if this is not done, that the time limit will be correspondingly extended (p. 361).

There is no fixed rule of law by which it can be determined how much time is reasonably required for doing the things which the Government officials did in connection with the execution of the contract. It is therefore always a question of whether, under all the circumstances, the officials have acted with such promptness as would be expected of a man of ordinary prudence. This is purely a question of fact, and when the Court of Claims found, from all the evidence and under all the circumstances, that in this case there was no unreasonable delay, this question was forever foreclosed. The findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury. (*Stone* v. *United States*, 164 U. S., 380, 382.) If this case had been tried before a

jury, it would have been for the jury to determine from all the circumstances what the fact was as to whether the delay was reasonable or unreasonable. This is what the Court of Claims has done. The question as to whether delay under particular circumstances is reasonable or not is exactly the same kind of question of fact involved in determining the reasonable value of an article, what amount is reasonable for the use of property, or whether or not from given facts a charge of fraud has been sustained.

Talbot v. *United States*, 155 U. S., 46.
United States v. *Berdan Fire-Arms Manufacturing Company*, 156 U. S., 552, 572.
United States v. *Adams*, 6 Wall., 101, 112.

CONCLUSION OF COURT OF CLAIMS AS TO REASONABLENESS OF DELAY FULLY JUSTIFIED BY FACTS FOUND.

If it could be said that there is a question of law involved in determining, from the facts found, whether the delay was reasonable or unreasonable, these facts establish conclusively the correctness of the conclusion reached by the Court of Claims. It is said that the delay was from May 11 to June 13, but the facts found show that but little of this time was consumed by officers of the Government. The contract was sent to the contractor from Grand Rapids, Mich., on May 11. Presumably it was sent to Milwaukee, Wis. At any rate, it was not returned to Grand Rapids until May 18. Certainly none of the intervening days can be charged against the Government. When it reached Grand Rapids it was accompanied by a bond. This bond recited that there was

on file in the War Department the proper evidence to show that the attorney in fact who signed it was authorized to do so. If this recital had been true, there would have been no reason why the contract should not have been approved as soon as it reached Washington. Since the appellant himself had furnished the bond with this recital, the officer at Grand Rapids had the right to rely upon its being true. Certainly there was nothing on the face of the papers from which he could have expected any delay at Washington, or which it was his duty to call to the attention of the appellant. He forwarded the papers to Washington the same day he received them, and no delay is therefore chargeable to him.

It happened, however, that the recital in question was not true and, for this reason, the contract could not be approved when it reached Washington. The objection was not merely technical or formal. An officer of the Government accepting a bond purporting to be signed by a surety company through an attorney in fact, without having proper evidence that the attorney in fact was duly authorized to sign, would be guilty of the grossest negligence. Whatever delay resulted, then, from the fact that a defective bond was furnished is not chargeable to the Government, but to the appellant himself, for he submitted the bond in the defective form. Two complaints, however, seem to be made against the War Department at Washington. It is suggested that some time might have been saved by telegraph-

ing instead of writing and calling attention to the defect. But surely there was no such urgency in the matter as to render it unreasonable to resort to the usual methods of correspondence. There is no law which requires such things to be done by telegraph instead of by mail. If it could ever be said that it is unreasonable to write instead of telegraph, it must be because of the existence of peculiar circumstances which impose the duty of unusually quick action, and manifestly it is a question of fact and not of law whether such circumstances exist in a particular case.

It is next suggested that the War Department communicated with the surety company instead of with the appellant. This seems a strange contention. If the purpose was to cause as little delay as possible, the War Department took precisely the course which was best calculated to accomplish that result. The evidence which was required was a copy of a resolution supposed to have been adopted by the directors of the surety company. If the War Department had communicated with the appellant, it would have been necessary for him to communicate with the surety company. Certainly it was reasonable to suppose that time could be saved by communicating directly with the company which must furnish the evidence. The War Department manifestly took the course which any reasonable man would have expected to bring the quickest results. It wrote the surety company promptly, and certainly can be charged with no reasonable delay in

that regard. Having written to the surety company at Chicago, it was not unreasonable to await a reply. The surety company, however, appears to have neglected the matter. The War Department continued to be diligent, and seven days later repeated its request. In answer to the second request the necessary evidence was mailed from Chicago to Washington on June 6th. Just when it reached Washington does not appear, but it could not have been much earlier than June 9th, the day on which the contract was approved, and on the next day the contract was mailed to Grand Rapids, Mich., and, upon the day of its receipt there, the contractor was notified by telegraph. Certainly no delay that resulted from failure to act on the part either of appellant or his surety can be charged against the Government. The result is that of the 33 days between May 11th and June 13th, aside from the time necessary for transmission of the contract through the mails, the Government officials consumed not more than two or three days, at the most, and the remainder of the time was consumed by appellant and its surety. If the question, therefore, was open in this court, it would seem impossible to reach any conclusion other than that the Government did not unreasonably delay the execution of the contract.

The authorities cited in the brief for appellant are in no way in conflict with this conclusion. The case of *District of Columbia* v. *Camden Iron Works* (181 U. S., 453) is the only decision of this court cited. But that case is clearly not in point. There the con-

tract was to be completed "within 136 days after the date of its execution; one-half of each size to be delivered on or before September 25, 1887, and the remainder on or before November 10, 1887." The contract bore date of June 29, 1887, but it was actually executed and delivered August 4, 1887. All that the court held was that, under the express terms of the contract, the contractor was entitled to 136 days, not from the date which the contract bore, but from the date on which it was executed, in which to do the work. It was said:

> The contract did not provide that the work was to be completed within one hundred and thirty-six days from its date, but "after the date of the execution of the contract." It is well settled that, in such circumstances, it may be averred and shown that a deed, bond, or other instrument was in fact made, executed, and delivered at a date subsequent to that stated on its face (p. 461).

In the present contract, however, the work was not to be completed within any given number of days after either the date or the execution of the contract. It was simply to be commenced within a certain time after notice of approval of the contract, and then to be completed on or before the following December 1. It was, therefore, merely a contract to do the work on or before that date, and the effect was to give to the appellant all the intervening time between the date of his contract and December 1, less whatever time should be reason-

ably consumed in the preliminaries necessary for the approval of the contract and notification to him.

The cases from the Court of Claims cited merely establish the proposition that, if the officers of the Government unreasonably delay the execution of a contract, the contractor will be entitled to an extension of time, and as has been stated, we have no quarrel with that rule.

DAMAGES ALLOWED ONLY THOSE PROVIDED BY THE CONTRACT.

Counsel have insisted that appellant can not be charged both with the $100 per day and the expenses of superintendence and inspection.

If, under the terms of the contract, it had been provided that the $100 per day should be treated as liquidated damages in lieu of *all* damages which the Government might sustain, the contention would be correct, but that is not the contract. From the language quoted above it will be seen that the parties agreed that, if the work should be delayed, the Government would suffer damages, but that, *except with respect to the additional expense of inspection and superintendence*, these damages would be difficult, if not impossible, of definite ascertainment and proof. In other words, they agreed that so far as the Government might be required to furnish inspection and superintendence for a longer period, the damages were perfectly capable of definite ascertainment, but that beyond this there would be damages which could not be ascertained under any fixed rule. They there-

fore agreed that in the one matter in which the amount of damage could be ascertained definitely, the Government should be entitled to recover the additional expense. Having done this, they then liquidated all *other* damages by providing for $100 a day.

The purpose to divide the damages into two classes was emphasized. The parties agreed that the damages which were impossible of definite ascertainment and proof and which were to be liquidated at the rate of $100 per day were "exclusive of expenses of inspection and superintendence." And this idea was repeated by providing that "the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence."

It is not denied that damages not otherwise ascertainable may be liquidated by a provision of this kind. Indeed, so far as the general damages are concerned, it is the only method under which they can be recovered where they consist merely in the delay of construction work intended for public use. If the entire damages can be liquidated in this way, no reason is perceived why this method shall not be applied only to that portion of the damages which can not be otherwise ascertained, leaving those items which are susceptible of direct proof to be recovered in the usual way.

It is said, however, that the specifications referred to in the advertisement for bids stated that the

contract "will provide for liquidated damages in an amount of $100 per day for any period of delay beyond the time agreed upon for completion."

The theory seems to be that this fact precludes a recovery for the additional cost of inspection and superintendence. But it will be observed that it was not stated that the liquidated damages of $100 per day should be all the damages to which the Government would be entitled. On the contrary, this same specification stated that the form of contract to be signed will be the one in general use and which will be shown to proposed bidders upon request. This form of contract is the one that was used and shows plainly that the $100 per day is to cover only such damages as are exclusive of the items of inspection and superintendence. The advertisement, specifications, and contract must all be taken together as furnishing the information upon which the bid was submitted, and when so considered the result is just what has been stated above. The cases cited by counsel for appellant do not conflict with this contention. When carefully examined they simply hold that where, from the language used, it is manifest that the parties contemplated that the damages which they were liquidating should include all recoverable damages, no other items of damage could be recovered. In other words, in each case the language employed must determine whether all damages are intended to be liquidated, or whether the intention is to confine these liquidated damages to only those

items which could not be established by definite proof. There is nothing in any of these cases which militates against the contention that the damages may be divided into two classes, as has been done in this case.

It is therefore respectfully submitted that there is no error in the judgment of the Court of Claims, and it should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

J. E. HATHAWAY & COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 255. Argued March 19, 20, 1919.—Decided April 14, 1919.

A finding by the Court of Claims that a delay by the Government in approving a contract was reasonable is a finding of ultimate fact, binding upon this court unless made without evidence or inconsistent with other facts found. P. 463.

Quaere: Whether unreasonable delay on the part of the Government in approving a contract can entitle the contractor to an extension where the contract fixes a definite date for completion of the work?

Id. District of Columbia v. *Camden Iron Works*, 181 U. S. 453, distinguished.

A provision for deducting, in addition to an amount fixed as liquidated damages, the expense of superintendence and inspection, in case of failure to complete the work by the time specified, will be enforced when clearly expressed in the contract. P. 464.

A contention that sufficient credit of time was not allowed by the Government to the contractor for extra work *held* not reviewable in this court, it not having been made in the Court of Claims. *Id.*

52 Ct. Clms. 267, affirmed.

THE case is stated in the opinion.

Mr. George A. King, with whom *Mr. William B. King* and *Mr. William E. Harvey* were on the brief, for appellant:

Here was a month taken, at the best season of the year for working, simply to obtain record evidence of the authority of the attorney in fact of the surety company to sign the contract. The delay was wholly on the part of the Government. Whether styled "reasonable" or "unreasonable," it was a delay for which the contractor was in no degree responsible. That the delay in signing the contract on the part of the Government was reasonable is, it is submitted, not a finding of fact but a conclusion of law. *United States* v. *Pugh*, 99 U. S. 265; *Sun Insurance Co.* v. *Ocean Insurance Co.*, 107 U. S. 485, 502, 503. Such a conclusion embodied in the findings of fact is not binding in this court.

When the contract was signed by the contractor and the bond executed by a surety company, the contractor had done everything which he could do to enter into a legally binding contract with the Government. To supply the slight defect a telegram should have been sent to the contractor.

The injustice of holding this contractor to a date of completion offered by him on April 29, when he was not

notified of the completion of the contract as a binding obligation of the Government until June 13, is apparent. As soon as the contractor made his bid April 29, 1910, he was bound. *United States* v. *Porto Rico S. S. Co.*, 239 U. S. 88. He was not notified that the contract was awarded to him until May 11, twelve days thereafter. There is no explanation of this delay and no apparent reason for it. *District of Columbia* v. *Camden Iron Works*, 181 U. S. 453, is directly in point. See also *American Dredging Co.* v. *United States*, 49 Ct. Clms. 350; *Ittner* v. *United States*, 43 Ct. Clms. 336; *Little Falls Knitting Mill Co.* v. *United States*, 44 Ct. Clms. 1; *Callahan Construction Co.* v. *United States*, 47 Ct. Clms. 229, 235, 236; *Laidlaw-Dunn-Gordon Co.* v. *United States*, 47 Ct. Clms. 271; *Missouri Valley Bridge & Iron Co.*, 19 Comp. Dec. 712.

Mr. Assistant Attorney General Frierson for the United States.

Mr. Justice Brandeis delivered the opinion of the court.

The United States solicited sealed proposals for the repair of a revetment in Michigan; and J. E. Hathaway & Company became the successful bidders. Under a contract, dated May 11, 1910, they agreed to complete the work by December 1, 1910. It was not completed until 68 days later. Of this delay the Government conceded that 29 days were attributable to extra work required by it, and 10 more days were not counted against the contractor, being Sundays and holidays. For the remaining 29 days' delay the Government deducted from the contract price $3082; claiming that amount under the provisions for liquidated and other damages. To recover the amount disallowed, J. E. Hathaway & Company brought suit in the Court of

Claims, which denied them relief (52 Ct. Clms. 267); and the case comes here on appeal.

First. Claimants contend that they were entitled to an extension of more than these 29 days' time for completing the work; because the contract and bond were delivered by them to the Government May 18, duly executed, but were not approved by the Chief of Engineers until June 9, and notice of approval was not given them until June 13. The origin of this delay was the failure of the surety company to file with the War Department a copy of the vote of its directors giving him who signed the bond as attorney in fact authority so to do. But claimants insist that this omission could have been quickly supplied, if the Government had telegraphed for a copy of the vote, and that practically all the delay was due to its unreasonable failure so to do.

The Court of Claims found: "There was no unreasonable delay on the part of the Government in approving the contract." This finding, like one of reasonable value, *Talbert* v. *United States*, 155 U. S. 45, 46, is a finding of an ultimate fact by which this court is bound, unless it appears that the finding was made without supporting evidence, *Cramp & Sons Co.* v. *United States*, 239 U. S. 221, 232; *Stone* v. *United States*, 164 U. S. 380; *United States* v. *Clark*, 96 U. S. 37, or is inconsistent with other facts found, *United States* v. *Berdan Fire-Arms Co.*, 156 U. S. 552, 573. There is no such lack of supporting evidence or inconsistency here. We have consequently no occasion to determine whether, as was held in *American Dredging Co.* v. *United States*, 49 Ct. Clms. 350, unreasonable delay on the part of the Government in approving a contract for an accepted bid can entitle the contractor to a corresponding extension of time, where a definite date is fixed by the contract for completion of the work. Compare *Monroe* v. *United States*, 184 U. S. 524. The case of *District of Columbia*

v. *Camden Iron Works*, 181 U. S. 453, 461, strongly relied upon by claimants, is clearly distinguishable. There the contract, as interpreted by the court, provided that the work should be completed, not (as here) by a date fixed, but within a certain number of days; and the number of days was to be measured, not from the date of the contract but from "the date of the execution of the contract." What was there decided is merely that under such circumstances it may be "shown that a deed, bond or other instrument was in fact made, executed and delivered at a date subsequent to that stated on its face."

Second. Claimants contend also that the Court of Claims erred in allowing, in addition to the sum of $100 a day as liquidated damages, the sum of $182 for the expense of superintendence and inspection. But the contract expressly provided that time should be deemed of the essence and that in case of failure to complete within the time specified "the contractor shall pay, in addition to the liquidated damages hereinbefore specified, all expenses for inspection and superintendence." There is no reason why parties competent to contract may not agree that certain elements of damage difficult to estimate shall be covered by a provision for liquidated damages and that other elements shall be ascertained in the usual manner. Provisions of a contract clearly expressed do not cease to be binding upon the parties, because they relate to the measure of damages. *Wise* v. *United States*, *ante*, 361.

Third. Claimants further contend that the credit of time allowed by the Government on account of the extra work should have been greater. On this matter no issue appears to have been raised below; and it is obviously not open for review here.

The judgment of the Court of Claims is

Affirmed.